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No. 84-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRACE X CHEMICAL, INC. and JOHN F. ARENS,

Petitioners,

—v.—

CANADIAN INDUSTRIES, LTD.,
C.I.L. AMMUNITION, INC.,
I.C.I. AMERICA, INC.
and IMPERIAL CHEMICAL INDUSTRIES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This brief is respectfully submitted by respondents Canadian Industries Ltd., now known as C-I-L Inc., and CIL Ammunition Inc. (collectively, "CIL") in opposition to the petition for a writ of certiorari filed by Trace X Chemical, Inc. ("Trace X").

Statement of the Case

A. Trace X's Position

CIL is the only commercial producer in North America of the explosive trinitrotoluene ("TNT"). Trace X purchased large amounts of TNT from CIL and used the TNT to make explosive primers. According to Trace X's petition:

1. Trace X, because of its concern over the availability, quality and price of TNT, "purchased the necessary manufacturing equipment to compete with CIL as a TNT manufacturer" (Pet. 15-16; *see also* Pet. 4). This act, according to Trace X, provided CIL with an incentive to drive Trace X out of business (*see* Pet. 8, 12).

2. After learning of Trace X's plan to enter the TNT manufacturing business, and "for no revealed reason," CIL cancelled all credit terms and required cash in advance from Trace X (Pet. 5).

3. CIL also "shipped over 107,000 pounds of defective TNT to Trace X" and refused to replace that TNT even though CIL had "received notice that other customers thought that the TNT was defective and a CIL employee admitted that in CIL's own tests, the TNT failed to meet specifications" (Pet. 6).

4. CIL announced to Trace X that "the substandard TNT would not be replaced because CIL wanted to eliminate Trace X as a probable threat to its North American TNT monopoly" (Pet. 8).

5. CIL's denial of credit to Trace X, and its failure to replace the allegedly defective TNT, had "the expected anticompetitive result of putting Trace X out of business" (Pet. 12).

Based on these facts, according to Trace X, (a) the jury properly found CIL liable for monopolization and (b) the Court of Appeals improperly reversed for want of sufficient evidence to support the verdict. Trace X is wrong as a matter of fact and as a matter of law; the case presents no issues that merit the granting of a writ of certiorari; and the issue raised by Trace X is not properly before this Court.

B. The Facts of Record

The Court of Appeals based its ruling upon a careful analysis of the undisputed facts of record. CIL's response to Trace X's petition is based upon the facts set forth in the Court of Appeals' opinion, which is reproduced at pages 35-60 of the petition. To the extent that we include additional undisputed facts, we have documented them by citation to the joint appendix ("JA") filed with the Court of Appeals.

1. As a significant user of TNT, Trace X became interested in manufacturing TNT as an alternative to purchasing most of its requirements from CIL (Pet. 38). In February of 1976, Trace X's president contacted CIL about its patented, continuous-process method for making TNT, and CIL offered to license its process at a cost of $3,500,000 (Pet. 38-39). Instead, in late 1976, Trace X's president purchased the equipment and blueprints for a mothballed military batch-process TNT plant in Childersburg, Alabama (Pet. 39). He planned to reconstruct the plant in Arkansas and operate it there (*ibid.*).

Trace X's investment in the mothballed equipment and blueprints was only $24,500, as against what Trace X estimated as a $2,000,000 cost for the entire TNT manufacturing project (JA 108-12). In order to raise the money for the project, Trace X prepared a prospectus for potential investors (Pet. 39). By March of 1977, when Trace X shut down its primer business and abandoned the TNT manufacturing project, it had commitments for investment only from its president and vice president (Pet. 39).* No contracts or commitments had been made by any customer other than Trace X itself (Pet. 39).

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* The pledge of Trace X's president, who was in bankruptcy, amounted to $150,000; the vice president's pledge was for an amount that remained unspecified even at trial (JA 112-14, 347-50).

2. Despite its knowledge of Trace X's desire to manufacture TNT, and despite shortages of TNT, CIL's sales to Trace X "increased steadily" from April through September of 1976 (Pet. 38-39, 56-57). By the end of that period, Trace X owed CIL $160,000 for the TNT it had received—an amount far in excess of Trace X's $16,000 credit limit (Pet. 39-40, 51 n.2). At a meeting in October 1976, CIL gave Trace X ten weeks to pay the $160,000, agreed to continue supplying Trace X and reaffirmed its commitment to supply all of Trace X's TNT requirements, subject to availability (Pet. 40, 51). In February 1977, CIL gave Trace X the further written assurance that it would supply 100,000 pounds of TNT per week thereafter (Pet. 41).*

After Trace X had run up the $160,000 bill, however, CIL refused to extend it any further credit (Pet. 40-42). It based this decision on Trace X's having exceeded its $16,000 credit limit and on "uncontradicted evidence that[:]

> "[a.] Trace X's parent company was in bankruptcy. . . .
>
> "[b.] Trace X had refused to supply Dun & Bradstreet with financial information. . . .
>
> "[c.] Trace X's auditors declined to give an opinion on Trace X's 1976 statement of earnings. . . .
>
> "[d.] Trace X had been unable to secure credit from other sources" (Pet. 49-50).**

---

* Trace X's TNT purchases from CIL were only 1.7 million pounds for the entire year 1976 (JA 1382).

** Trace X also had an explosion at its plant in December 1976 and ceased production for 45 days (JA 365-66, 1386).

As the Court of Appeals concluded:

> "CIL's denial of credit to Trace X under these circumstances cannot be considered an unlawful use of monopoly power" (Pet. 50).
>
> "On the basis of the evidence presented, CIL's refusal to extend credit did not amount to unreasonable anti-competitive conduct, but rather constituted a valid exercise of business judgment" (*ibid.*).

3. Trace X also complains that in August 1976, CIL provided it with 107,000 pounds of allegedly defective TNT, which CIL later failed to replace (Pet. 6-8). The facts are as follows:

a. CIL tested the TNT before shipping it to Trace X and concluded that the TNT was satisfactory (Pet. 53). Trace X's president admitted that he had no proof that CIL knew that the TNT was defective when shipped to Trace X (*ibid.*). As the Court of Appeals stated, "[T]here is no evidence in the record to support Trace X's suggestion that CIL deliberately supplied Trace X with defective TNT" (*ibid.*).

b. In September 1976, some of Trace X's customers complained that primers supplied by Trace X were misfiring (Pet. 41). Trace X sent some of the primers to CIL and claimed that the defect lay in the TNT that CIL had supplied for the primers (Pet. 41, 53). CIL's experts analyzed the primers, concluded that the TNT was not defective, and further concluded that the failures resulted from Trace X's manufacturing process rather than from the TNT supplied by CIL (Pet. 53). The Court of Appeals held that "[i]t was not an abuse of its monopoly power for CIL to rely on the tests run by its own research depart-

ment and, therefore, refuse to replace the TNT" (Pet. 53-54).*

4. Trace X claims that CIL's denial of credit and refusal to replace the TNT were all effected with anticompetitive intent. As evidence, Trace X points to an alleged statement by CIL at a meeting in late March of 1977, when Trace X asked CIL to replace the TNT. According to Trace X's president, a CIL marketing manager replied, "Why would we do that? If we exchange the TNT, you will just use your profits to compete against us in the manufacture of TNT" (Pet. 42, 53, 57-58).** CIL's marketing manager and the other CIL representative at the meeting denied that any such statement had ever been made; indeed, CIL never took Trace X's manufacturing project seriously (JA 674, 764, 1023).

5. Even assuming that CIL made the statement attributed to it, that statement would not support any reasonable inference that CIL's denial of credit and failure to replace the allegedly defective TNT were improper or "had the expected anticompetitive effect of putting Trace X out of

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* Contrary to Trace X's suggestion (Pet. 6), there was no evidence that customers other than Trace X thought CIL's TNT to be defective, and there was no evidence that CIL's tests in 1976 or 1977 showed the TNT to be defective. All of the evidence was to the contrary (JA 758, 759, 1320-21, 1385).

Trace X's reference to CIL's testing (Pet. 6) is apparently to a statement by an outside consultant retained by CIL for the trial in 1982 of a breach of warranty action brought by Trace X regarding the allegedly defective TNT. Trace X won a jury verdict in that trial, in part on the basis of the consultant's testimony, in cross-examination by Trace X, that some of the TNT had failed to meet certain military specifications which CIL contended were irrelevant to Trace X's commercial use (*see* Pet. 52-53; JA 760, 766-67, 1260-61). CIL's contemporaneous tests in 1976 and 1977 had shown that the TNT met Trace X's specifications (JA 1320, 1385).

** Trace X's vice president testified to a similar statement that he attributed to another CIL employee (Pet. 58).

business" (Pet. 12). CIL's actions in supplying Trace X with ever-increasing amounts of TNT despite shortage conditions, and in providing Trace X with written assurance of future supplies, are inconsistent with the claim that CIL wanted to drive Trace X out of business:

> —CIL took extraordinary steps to obtain the TNT that Trace X needed—steps that included soliciting other CIL customers for supplies and purchasing TNT from abroad (JA 742-45).
>
> —CIL delivered approximately 1.7 million pounds of TNT to Trace X in 1976, when it knew of Trace X's TNT manufacturing project. This was six times as much as the 280,000 pounds it delivered to Trace X in 1975 and more than forty times as much as the 40,000 pounds it delivered in 1974 (*see* JA 1382).
>
> —In February 1977, CIL gave Trace X written assurance that it would supply up to 100,000 pounds a week (Pet. 41), *i.e.*, over 5 million pounds a year.

In short, CIL worked hard to develop Trace X as a customer both before and after CIL knew about Trace X's TNT manufacturing project. Nevertheless, CIL was unwilling to provide credit because Trace X was patently uncreditworthy, and CIL was unwilling to provide replacement TNT free of charge because its own technical experts believed on the basis of two sets of tests that the original TNT had been satisfactory and had met Trace X's specifications.

Although Trace X tries to blame CIL for its failure, the cause of the failure is simple and not at all sinister. Trace X's own evidence showed that it was never able to obtain the financing necessary to support the TNT manufacturing project (Pet. 39; JA 112-13); that it had never had adequate financing even for its primer business (JA 585); that

it had made little money on its primer business through September 1976, even on the basis of financial statements that its auditors refused to certify (JA 1006-16; *see* Pet. 50); that it had had an explosion at its plant and had shut down for six weeks in December 1976 and January 1977 (JA 365-66, 1386); and that it needed business so badly, in early 1977, that it deliberately sent to a major customer a shipment of primers that had failed the Trace X quality control test (JA 719-20). By March 1977, Trace X reached the perhaps-inevitable conclusion that it had to close down. The present lawsuit represents Trace X's efforts to shift the blame for its failure to CIL, its principal supplier.

Summary of Argument

Trace X's petition should be denied for two principal reasons:

First, the issue presented by Trace X's petition is not properly before this Court. The Court of Appeals based its opinion on the principle that a company with monopoly power may be held liable under Section 2 of the Sherman Act only if it engages in "anti-competitive" conduct. That principle was clearly set forth in the charge to the jury, which Trace X accepted without objection. Trace X should not be permitted to challenge in this Court a legal principle that it accepted in the charge to the jury.

Second, the opinion of the Court of Appeals is entirely consistent with the prior decisions of this Court and of the other courts of appeals. This Court and the lower courts have consistently required proof of anticompetitive conduct —*e.g.*, conduct that by its very nature establishes barriers to competition—to support charges of monopolization. As the court below found, there was no evidence of such anti-

competitive conduct in the present case. CIL simply denied credit to an uncreditworthy customer and refused to provide that customer with a free replacement for TNT that had tested out satisfactorily on two occasions—before shipment and after Trace X claimed that it was defective. Such straightforward, objectively-justified commercial decisions do not constitute unlawful monopolization.

ARGUMENT

A. The Issue Presented by Trace X Is Not Properly Before This Court

Trace X seeks to have this Court rule upon the following question:

> "*whether specific,* 'predatory' or 'unlawful' *anticompetitive conduct is required* to make out a violation of section 2 under the Sherman Act' (Pet. i) (emphasis added).

That issue is not properly before the Court. The case was presented to the jury on a charge, which Trace X accepted (JA 790), that included the following language:

> To establish monopolization, Trace X must prove that "they [CIL] have to willfully go out and take anticompetitive action to drive or keep people out of the market" (JA 809).
>
> To establish attempted monopolization, Trace X must prove that CIL engaged in "some anticompetitive or exclusionary conduct done in furtherance of that purpose or intent [to monopolize]" (JA 809).
>
> "Conduct which involves *business practices that are customary and legitimate in the field,* the introduction of superior product, *the exercise of business judgment,* or conduct reasonably responding to competition *can-*

not be found to be anticompetitive or exclusionary" (JA 810) (emphasis added).

As the Court of Appeals pointed out, the "general principles" on which it based its opinion—and in particular the element of anticompetitive conduct—"were outlined in the district court's charge to the jury" (Pet. 46-47, 49). If Trace X believed that the charge was improper, it should have objected at the time the charge was given. Trace X did not do so; it never suggested to the District Court that the charge was improper. In effect, Trace X is attempting in its petition for certiorari to attack a charge and a legal principle that it agreed to at trial. For this threshold reason, Trace X's petition should be denied.*

Trace X also appears to suggest that CIL acquired its monopoly position unlawfully (Pet. 20). That issue is not appropriately before the Court because it is purely a factual issue that is beyond the scope of the issue presented by Trace X. In any event, the only evidence on the subject indicated that CIL emerged with monopoly power because its competition abandoned the TNT business (a declining business) in view of (a) inroads made by newer explosives, and (b) environmental problems associated with the production of TNT (JA 738-40).

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* Federal Rule of Civil Procedure 51 states that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." This Court will disregard the "uncompromising language" of Rule 51 only in extraordinary circumstances. *See Newport* v. *Fact Concerts*, 453 U.S. 247, 255 (1981) (opinion of the Court); *id.* at 274-75 (Brennan, J., dissenting). No such circumstances are presented by Trace X's petition.

B. There Is No Conflict Between the Court of Appeals Opinion and Prior Decisions of This Court or of Other Circuit Courts

To the extent that the charge to the jury and the opinion below differed, the opinion below was more favorable to Trace X than the charge. The fundamental principle underlying the Court of Appeals' decision was the following:

> "To prove a violation of Section 2 under the Sherman Act, whether based on a claim of attempted monopolization or actual monopolization, it must be shown that CIL engaged in anti-competitive behavior" (Pet. 46).

Since there was "insufficient evidence as a matter of law" to support a finding of anticompetitive conduct (Pet. 49), the Court of Appeals overturned the District Court's judgment against CIL.

Trace X asserts that this ruling was inconsistent with a series of cases (decided by this Court and various courts of appeals) which involved inherently exclusionary practices, *i.e.*, practices that by their nature establish barriers to competition. The cases hold that such practices may be prohibited even if they fall short of being "manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition" (*United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945)); and that monopolization may be found despite the lack of "predatory practices" or otherwise unlawful actions (*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 496-99 (1968); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946)). In the cases cited above, the following exclusionary practices, among others, were found to be unlawful when engaged in by corporations with monopoly power: developing production overcapacity with the purpose of forestalling others from entering the market (*Alcoa, supra*, 148 F.2d at 430, 431); offering essential manufacturing

equipment only on the basis of ten-year leases with provisions that had a "special deterrent effect" on customers' using competitive products (*Hanover Shoe, supra,* 392 U.S. at 507-08); conspiring to buy up the supply of cheap tobacco in order to preclude manufacturers of cheap cigarettes from getting the tobacco necessary for their production, conspiring to sell major brand cigarettes at a loss for a short period of time in order to curtail the market inroads being made by cheaper brands, and conspiring to coerce dealers to resell the cheaper brands at only three cents less than the conspirators' major brands (*American Tobacco, supra,* 328 U.S. at 803-04, 806-08). Some of these practices might have been lawful if undertaken by companies that lacked monopoly power, and some may not have had the effect of completely excluding competition (*see Hanover Shoe, supra,* 392 U.S. at 496), but all were held unlawful when undertaken by monopolies.

There is no conflict between the foregoing decisions and the decision below. CIL's conduct was not, like a long-term lease with restrictive provisions, inherently exclusionary. What CIL did was (a) to deny credit to a patently uncreditworthy customer—a customer that could not get credit from its own bank (JA 1019; Pet. 50); and (b) to accept the conclusions of its own experts, who tested the allegedly defective TNT before shipment and after Trace X's primers had failed, rather than accede to the request of a disgruntled customer. We are aware of no appellate ruling that would prohibit a company with monopoly power from making such ordinary and objectively-justified commercial decisions, even if the decisions had an adverse effect on potential or actual competitors.*

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* We note that a creditworthy Trace X would not have been troubled by CIL's denial of credit or its refusal to provide free replacement TNT. If Trace X had been financially sound, it would have been able to obtain credit through other channels.

Trace X tries to create a conflict between the court below and this Court by asserting that the court below "required petitioner to show specific '*predatory or unlawful anti-competitive conduct*'" (Pet. 13) (emphasis added). The court below imposed no such requirement; the purported quotation does not exist. The court was careful to require, as a prerequisite to liability, only a showing of "anti-competitive" conduct (Pet. 46)—*not* a showing of predatory conduct (defined by Webster as "characterized by plundering, robbing, or exploiting others") and *not* a showing of otherwise-unlawful conduct.

Trace X also appears to suggest (Pet. 18) that the opinion below is inconsistent with this Court's holding, in *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."* *See also Alcoa, supra*, 148 F.2d at 432, cited at Pet. 22. As the court below found, CIL's decisions regarding credit and replacement of the TNT did not in any way stem from or constitute a use of monopoly power; they were commercial decisions of the kind that every supplier makes in the ordinary course of its business (*see* Pet. 49, 50, 52-54). *Griffith* is inapplicable.

Finally, Trace X suggests that the opinion below conflicts with decisions in the Second, Ninth, Tenth and District of Columbia Circuits (Pet. 21). In fact, the court below cited to and applied decisions in the Second, Ninth and Tenth Circuits among others (Pet. 44-52) and never indicated any disagreement with any ruling of any other

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* In *Griffith*, four theater companies were held to have unlawfully used their monopoly power in one-theater towns to negotiate exhibition contracts that also covered towns in which competition existed.

circuit. The appellate decisions cited by Trace X simply apply the principles established by this Court in the cases discussed herein and are entirely consistent with the decision below.

The latter point is confirmed by a review of the two cases most heavily relied upon by Trace X (Pet. 26-30). In *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), the court carefully examined each of the allegedly anticompetitive practices and held that a prima facie case of monopolization was made out only by those that "unnecessarily, even deliberately, excluded leasing companies from an opportunity to compete." 559 F.2d at 499-502. The court referred to these actions as "exclusionary sales tactics to maintain [IBM's] monopoly power in the lease market." *Id.* at 503. *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), like *Alcoa, Hanover Shoe* and *American Tobacco*, involved the maintenance of monopoly power through inherently exclusionary conduct. The conduct in *Hecht* was the imposition by the Washington Redskins of a clause, in the Redskins' 30-year lease of RFK Stadium, that precluded the owners from renting the stadium to any other professional football team. 570 F.2d at 985. That clause effectively precluded any football team other than the Redskins from playing in Washington, since RFK Stadium was allegedly the only stadium in the Washington metropolitan area suitable for professional football. *Id.* at 985-86.

C. Policy Considerations

As the Court of Appeals pointed out, " 'Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms on which they will deal' . . . nor does

it require a monopolist to accede to every demand of its competitors or customers" (Pet. 51-52). If Trace X's analysis were adopted by this Court, however, a company with monopoly power could be subject to liability every time it undertook an action that might damage a competitor or even a potential competitor, assuming that the plaintiff could generate some evidence of anticompetitive intent.* Thus, a company with monopoly power could be found liable if it cut its price (while still making a profit) to meet a competitor's price, if there was evidence that the price cut was intended to take business away from the competitor. Such a result would discourage rather than foster healthy competition. Similarly, a monopoly that offered to sell components to a potential competitor could be subject to liability if it insisted, in accordance with ordinary commercial practice but for allegedly anticompetitive reasons, that the potential competitor purchase in truck-load lots or take delivery at the manufacturer's plant or absorb the cost of insurance. To make such day-to-day decisions actionable would give to juries a virtually free rein to set standards of conduct for companies that possess monopoly power, however innocently that monopoly power may have been achieved.

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* That evidence could be as thin as in the present case, where Trace X's officers claimed that CIL made oral statements of anticompetitive intent—statements that were inconsistent with CIL's conduct, contemporaneous documentation and trial testimony.

CONCLUSION

Nothing in the facts of the present case warrants this Court's attention. The legal principle on which the case turned was subsumed within a jury charge that petitioner accepted, and in any event was entirely consistent with prior decisions of this Court and the various courts of appeals. For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Eighth Circuit should be denied.

Dated: New York, New York
December 18, 1984

Respectfully submitted,

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APPENDIX

C-I-L Inc.

Rule 28 Listing of Parents, Subsidiaries and Affiliates

Ultimate Parent:

Imperial Chemical Industries PLC

Immediate Parent:

Imperial Chemical Industries of Canada Ltd.

Subsidiaries and Affiliates (Except Wholly Owned Subsidiaries):

Agrocentre Farnham Inc.
Agrocentre St. Hyacinthe Inc.
Agrocentre St. Pie Inc.
Agrocentre St. Remi Inc.
Alchem Inc.
BAPCO
Barkey Agromart Ltd.
Bay Industries Ltd.
Bluewater Agromart Limited
Boyes Explosives (Eastern) Limited
Brussels Agromart Ltd.
BXL Bulk Explosives Limited
CXA Ltd./CXA Ltee
Canadian "Mud Lab" Chemical and Manufacturing Co. Ltd.
Canso Chemicals Limited
Cardinal Farm Supply Limited
MoDo Chemetics Do Brazil
MoDo Chemetics AB
Cornwall Chemicals Limited
East-Chem. Inc.
Expro Chemical Products Inc.

Fingal Farm Supply Limited
Grand Falls Agromart Ltd./
Agrocentre Grand Falls Ltee
Grand River Farm Supply Limited
Hartland Agromart Ltd.
Harvex Agromart Inc.
Hoegy's Farm Supply Limited
Jarvis Clark de Mexico S.A. de C.V.
Jarvis Clark Pty. Limited
Les Engrais Chimiques Y. Roy Inc.
Les Engrais Lanaudiere Inc.
Les Explosifs Chretien
Longwood Agromart Limited
Malpeque Fertilizers Ltd.
Maple Farm Supply Limited
Max Underhill's Farm Supply Limited
Munro Fertilizers Ltd.
National Mud Control Laboratories
Oxford Agropro Ltd.
Scotland Agromart Ltd.
Setterington's Fertilizer Service Limited
SOPEC
Sprucedale Agromart Limited
Tri-County Agromart Ltd.
Tricil Limited—Tricil Limitee
West African Explosives & Chemicals Ltd.
Westisle Farm Supply Ltd.